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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 784

THE BOARD OF PUBLIC INSTRUCTION OF BAY COUNTY, FLORIDA, ET AL., *Petitioners*,

v.

JEAN CAROLYN YOUNGBLOOD, ET AL., and UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

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No.

THE BOARD OF PUBLIC INSTRUCTION OF BAY COUNTY, FLORIDA, ET AL., *Petitioners,*

v.

JEAN CAROLYN YOUNGBLOOD, ET AL., and UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

THE BOARD OF PUBLIC INSTRUCTION OF BAY COUNTY, FLORIDA, and others, your petitioners, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on July 24, 1970.

OPINIONS BELOW

The opinion of the court below on the first appeal is reported *sub nom. Singleton* v. *Jackson Municipal Separate School Dist.* at 419 F.2d 1211. The opinion of the court below on the present appeal and the dissenting opinion on such appeal (Appendix A, *infra,* pp. A1-A11) have not yet been reported.

JURISDICTION

The opinion of the court below was entered on July 24, 1970 (Appendix A, *infra,* p. A1). Under the present practice of that court in school board cases, the opinion in such cases is issued as and for the mandate. A timely petition for rehearing was denied on September 11, 1970 (Appendix B, *infra,* p. A12).

QUESTIONS PRESENTED

1. Whether the Constitution requires school boards to achieve racial balance in each school in their districts in an otherwise unexceptionable unitary school system, especially where such racial balancing can only be obtained by busing nearly two thousand kindergarten through sixth grade schoolchildren away from their neighborhoods for long periods on every school day, and excludes them from their neighborhood walk-in schools because of their race or color.

2. Whether the court below, which decreed substantial dislocations in order to achieve racial balance in each school in the school district, improperly disregarded the explicit direction of Congress, implementing the XIV Amendment under Section 5 thereof in Section 401(b) of the Civil Rights Act of 1964, that " 'desegregation' shall not mean the assignment of students to public schools in order to overcome racial imbalance."

3. Whether the court below, which decreed substantial dislocations in order to achieve racial balance in each

school in the school district, improperly disregarded the explicit direction of Congress, implementing the XIV Amendment under Section 5 thereof in Section 407(a)(2) of the Civil Rights of 1964, that "nothing herein shall empower any * * * court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another in order to achieve such racial balance."

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Section 1 of the Fourteenth Amendment provides, in pertinent part—

> "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. Section 5 of the Fourteenth Amendment provides:

> "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

3. Section 401(b) of the Civil Rights Act of 1964 (42 U.S.C. § 2000c(b)), provides:

> "As used in this title—* * *
>
> "(b) 'Desegregation' means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, but 'desegregation' shall not mean the assignment of students to public schools in order to overcome racial imbalance."

4. Section 407(a) of the Civil Rights Act of 1964 (42 U.S.C. 2000c-6(a)) provides in pertinent part:

> "Whenever the Attorney General receives a complaint in writing * * * to the effect that * * * minor children, as members of a class of persons similarly

> situated, are being deprived by a school board of the equal protection of the laws * * * the Attorney General is authorized * * * to institute for or in the name of the United States a civil action * * * for such relief as may be appropriate * * * provided that nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards."

5. Section 410 of the Civil Rights Act of 1964 (42 U.S.C. § 2000c-9) provides:

> "Nothing in this title shall prohibit classification and assignment for reasons other than race, color, religion, or national origin."

STATEMENT

This is another school desegregation case in which racial balancing has been judicially decreed. The issue now presented is a narrow one, enabling the facts essential to its resolution to be presented in brief compass.

A. Factual Background

Bay County is located in northwest Florida, in that State's panhandle. The county has a total population of some 70,000, of which 17,000 odd are school children; of the latter 18% or about 3,000 are black. Petitioner Board of Public Instruction is currently operating two senior high schools, four junior high schools, and 19 elementary schools.

The bulk of the black population of Bay County is concentrated in an area in Panama City two miles square, where originally Rosenwald Junior High and Oscar Patterson and A. D. Harris elementary schools were built to serve black students.

B. Earlier Proceedings

The present action was filed in 1963, resulting in an order in July 1964 for a "grade-a-year transfer plan." This plan was thereafter voluntarily accelerated by the Board through desegregation by six grades. The United States intervened in the litigation in 1966, and in April 1967 the district court directed entry of a freedom of choice plan.

In that year all the black senior high school students were integrated into the two formerly white senior high schools. Then, following this Court's decision in *Green* v. *County School Board,* 391 U.S. 430, further desegregation was effected, with the result that, by the school year 1968-69, 39 per cent of the black students were enrolled in formerly white schools, although hardly any white students had transferred or been transferred to formerly black schools.

In April 1969, the district court entered orders approving the Board's plan for further desegregation, but this was deemed inadequate by respondents and by the United States, both of whom appealed to the court below.

That tribunal, in a consolidated in banc proceeding involving 12 other school cases, said of Bay County (*Singleton* v. *Jackson Municipal Separate School Dist.,* 419 F.2d 1211, 1221-22):

> "This system is operating on a freedom of choice plan. The plan has produced impressive results but they fall short of establishing a unitary school system.
>
> "We reverse and remand for compliance with the requirements of Alexander v. Holmes County [396 U.S. 19] and the other provisions and conditions of this order."

The foregoing ruling required further faculty desegregation by February 1, 1970, but deferred further student desegregation until September 1, 1970. On December 15,

1969, following this Court's order in another of the consolidated cases, *Carter* v. *West Feliciana School Bd.*, 396 U.S. 226, Mr. Justice Black ordered further student desegregation in Bay County by February 1, 1970, also. Faculty desegregation is no longer in issue.

C. Present Appeal and Decision Below

Thereafter the Department of Health, Education and Welfare filed a desegregation plan, to which the Board objected; the Board filed a plan of its own; and later the Board filed an amended plan, based on geographic attendance zones for all schools, including the remaining black schools; the zone boundaries of the latter had been drawn by the black principals of those schools without regard to race. As the Board's superintendent testified in district court on the hearing held on those plans (Tr. 141), "I wanted to stay out of the statistics business, and in the business of children."

The results of the three plans appear in tabular form in the opinion below (Appendix A, *infra*, p. A4, note 7):

School	*Cap.*	*9/1969 Enrollment*			*HEW Proj. Enrollment*			*Bd's Proj. Enrollment*			*2/1970 Enrollment*		
		W	*N*	*T*	*W*	*N*	*T*	*W*	*N*	*T*	*W*	*N*	*T*
Rosenwald	1000	0	377	377	629	191	820	127	378	505	75	275	350
Harris	650	0	595	595	256	82	338	16	593	609	3	472	475
Patterson	680	2	626	628	324	84	408	171	485	656	115	473	508

The district court approved the Board's amended plan, but on appeal the court below once more reversed, saying (Appendix A, *infra*, pp. A10-A11):

> "We again note that the Bay County School Board has 'produced impressive results' in desegregation. At the same time, we have concluded that it has not gone far enough. We reverse and remand this case for proceedings consistent with this opinion. We suggest to the district court that it would be helpful to order that the team from HEW work with school

officials to revise the geographic zones proposed by HEW on the basis of the up to date pupil locator maps. These proposals should then be filed with the court and the parties permitted to file any objections or proposed modifications, after which the district court should hold a prompt hearing and shall approve a more effective desegregation plan to be put into effect in September 1970.

"In the light of up-dated information and other pertinent facts, HEW and the Board should explore the feasibility of retaining the classrooms especially designed for the Educable Mentally Retarded Unit at Rosenwald School. Consideration should also be given to retention of the County-Wide Education Media Center at Rosenwald or its relocation at another school."

Judge Coleman, while agreeing that the feasibility of retaining the Educable Mentally Retarded Program at Rosenwald should be explored, dissented in all other respects (Appendix A, *infra,* p. A11):

"It seems to me that this decision again allows statistics, in isolation, to outweigh all other considerations. I would hold that Bay County in fact does have a public school system in which no child is deprived of the right to attend a school on account of his race or color.

"I would not further disrupt this school system solely to attain a more evenly distributed racial balance, which, as I understand it, is not required by the Constitution if the school system is a unitary one."

D. Consequences of New Plan Directed by District Court Pursuant to Decision Below

Under the terms of the Fifth Circuit's opinion, the "prompt hearing" that the district court was directed to hold in order to "approve a more effective desegregation plan to be put into effect in September 1970" was held on August 14, 1970. But the only guidance then

available to the district court was that contained in the following paragraph in the majority opinion (Appendix A, *infra*, p. A7):

> "The record contains suggested alternatives available to the Board which would totally eradicate all vestiges of the dual school system and deal with the problems of the flight of white parents and resegregation. This could be accomplished at the junior high level simply by drawing a zone on the basis of the full capacity of the school. At the elementary level, the Negro schools could be paired with white schools."

At such hearing, the district court with one modification approved a plan prepared two years previously by a Department of Justice attorney in this case, which plan utilized Area Sixth Grade Centers in order to effect desegregation. The district court rejected both the Board's expanded geographic zone plan as well as the HEW pairing plan. The district court's order and the plan that it approved are set out in Appendix C, *infra*, pp. A13-A20.

The substance of the foregoing approved plan is this:

(a) The 453 6th grade children now in six elementary schools (Cherry Street, Cove, Lucille Moore, Northside, Oakland Terrace, and St. Andrew) will be bused to the A. D. Harris school, where, with the 71 6th graders formerly there, they will constitute a student body that is 73% white and 27% black.

(b) The 423 children formerly in A. D. Harris in grades from kindergarten to 5th grade will in turn be bused to the six schools listed in par. (a).

(c) The 467 6th grade children now in five elementary schools (Callaway, Cedar Grove, Millville, Parker, and Springfield) will be bused to the Oscar Patterson school, where, with the 75 6th graders formerly there, they will

constitute a student body that is 87% white and 13% black.

(d) The 508 children formerly in Oscar Patterson in grades from kindergarten to 5th grade will in turn be bused to the five schools listed in par. (c).

The elementary schools listed in par. (a) are from 4.5 to 1.7 miles distant from A. D. Harris, those in par. (b) are between 5.3 to 1.5 miles away from Oscar Patterson.

Those school distances necessarily do not measure the busing involved, inasmuch as many of the pupils originally attending the outlying schools lived at some distance beyond them and thus farther away from that part of Panama City where A. D. Harris and Oscar Patterson are located.

Consequently the busing required under the approved plan involves for some children round trips of 18.5, 15.5, 14.1, and 12.5 miles. This requires such children to be away from their home neighborhoods from 6:30 or 7:15 A.M. until between 4 and 5:30 P.M. on each school day.

REASONS FOR GRANTING THE WRIT

This case presents essentially the same issues as does *Pinellas County, Florida* v. *Bradley,* No. 632, this Term, now pending on petition for certiorari, but with this variant, that while in the *Pinellas County* case the Fifth Circuit decreed massive busing to eliminate nine all-black or almost all-black schools found to be the result of housing patterns in St. Petersburg, here the same tribunal has directed extensive busing over longer distances, requiring young children to be away from their homes for long periods every day, in order to eliminate black-majority schools in the smaller black residential section of Panama City.

Thus in this case the court below has ruled that, even without any all-black schools, a unitary school system ceases to be such if it includes any black-majority schools.

The dispassionate observer may well inquire, What constitutional, legal, or educational value is being served by the consequent uprooting of nearly 2000 small children from their homes, some of them for 10 hours each school day? He may similarly ask, What rights are being vindicated, what constitutional principles are being effectuated, by a judicial order whose traumatic effect operates only on the very young, beginning with kindergarten and stopping with the 6th grade?

It is petitioners' view that the order in this case issued under compulsion of the opinion below is not required by anything in the Fourteenth Amendment, runs directly counter to the solemn direction of Congress in its implementation of that Amendment, and moreover violates the direction of this Court (*Alexander* v. *Board of Education*, 396 U.S. 19, 20) for "unitary school systems within which no person is to be excluded from any school because of race or color"—for here many hundreds of school children are being moved long distances from their neighborhood schools in order to satisfy the Fifth Circuit's predilections in respect of racial classification and percentages.

First. The public importance of the busing issue is attested by this Court's order of August 31 that set for early argument in October a sextet of school busing cases.

Second. Up to now, however—or at least up to mid-September, when this petition received its final substantial revision—up to then, the materials on file in those six cases did not fully, or, in our view, adequately, reflect the impressive legislative history underlying the two anti-busing provisos now in question, a history showing with peculiar clarity that the concept of racial balancing as a form of desegregation was explicitly and emphatically

disapproved by Congress when it enacted the Civil Rights Act of 1964.

At the outset, in asking Congress to assert its authority to enforce the Fourteenth Amendment, the President noted the educational problems flowing from racial imbalance. The first bills thereafter introduced contained numerous provisions dealing with those problems, but the House Judiciary Committee struck out every one of them. The anti-racial-balancing clause now in Section 401(b) was accepted on the House floor by the Chairman of the Judiciary Committee, in charge of the bill. Following complaints by Southern senators that the bill as it reached the Senate would permit transportation of school children back and forth to achieve racial balance, the anti-racial-balancing proviso now in Section 407(a) was drafted by the four bipartisan civil rights leaders who directed the measure through the Senate. One of those leaders said that "if the bill were to compel [the busing of children to achieve racial balance] it would be a violation, because it would be handling the matter on the basis of race and would be transporting children because of race." An amendment to strike both anti-busing provisos, proposed by the leader of the Senate opposition to the Civil Rights Act as a whole, was defeated 18-71.

In order to avoid unduly lengthening the body of this petition, we have set forth the essential features of the foregoing legislative history in Appendix D, *infra,* pp. A21-A27. It follows fairly closely what already appears in the *Pinellas County* petition in No. 632 at pp. 14-22, but adds a number of items not included there.

Third. In the Memorandum for the United States as *Amicus Curiae* filed in *McDaniel* v. *Barresi,* No. 420 of this Term, it is said at p. 6 (footnote omitted):

> "2. Equally unsound is the Georgia Supreme Court's notion that the school board's plan violates Sections 401(b) and 407(a) of the Civil Rights Act of 1964. Those provisions, applying only to federal courts and

officials, do not purport to be prohibitions but are simply disclaimers of granting new power to federal authorities to deal with purely adventitious, de facto segregation. Thus, they have no effect whatever on the powers of a school board. See, e.g., *United States* v. *Jefferson County Board of Education, supra,* 372 F.2d at 878-886; *United States* v. *School District 151,* 286 F. Supp. 786 (N.D. Ill.), affirmed, 404 F. 2d 1125 (C.A. 7); *Spangler* v. *Pasadena City Board of Education,* 311 F. Supp. 501 (C.D. Cal.); *Keyes* v. *School District Number One, Denver, Colo.,* 303 F. Supp. 289 (D. Col.); *Swann* v. *Charlotte-Mecklenburg Board of Education,* No. 14,517 at 20-21 (C.A. 4, May 26, 1970). See, also, 110 Cong. Rec. 1518, 1598, 12714, 13820 (1964)."

The foregoing excerpt places the United States in the position of directly contradicting the civil rights leaders who succeeded in placing the Civil Rights Act of 1964 on the books, and of adopting instead the views of that measure's principal opponent, who complained that it was a sectional bill aimed only at the South. Thus the Government reads the statute, not as written, but as though Senator Russell and his followers had succeeded in striking both anti-busing provisos from the bill, success that so notably eluded them in the Senate.

Otherwise stated, the Government rejects the interpretation of the anti-busing provisos formulated by the sponsors and supporters of the Civil Rights Act of 1964 and instead adopts the position of the opponents of that measure.

Moreover, the references to legislative history in the quoted extract are so very fragmentary as to be completely misleading, as will be seen from the short summary in Point *Second* above and particularly from the more extended treatment appearing below in Appendix D, pp. A21-A27.

Fourth. This case raises the same questions regarding the effect to be given Congressional formulations of Fourteenth Amendment requirements as does the *Pinellas*

County petition in No. 632 in its Point *Fourth* at pp. 22-23. It therefore seems to us unnecessary to repeat here the framing of those issues already presented to the Court.

The Board is fully aware of the final clause of § 407(a), "or otherwise enlarge the existing power of the court to insure compliance with constitutional standards." The Board's position is that nothing in the Constitution requires racial balancing any more than anything in that instrument requires economic balancing or social balancing. Those are concepts that do not flow from the Equal Protection Clause, they are ideas sought to be read into that Clause by their egalitarian proponents.

In short, it is the Board's view that, just as the Equal Protection Clause does not require racial balancing in jury selection (*Cassell* v. *Texas,* 339 U.S. 282, 286-287, 290-291; *Swain* v. *Alabama,* 380 U.S. 202, 208-209), so likewise it does not require racial balancing in school administration. Indeed, when racial balancing is undertaken as it has been here, there is being operated a unitary school system in which almost two thousand children are effectively excluded from the schools nearest their homes, simply because their race or color does not otherwise achieve the optimum racial percentages favored by the Fifth Circuit.

Fifth. As has been seen, Bay County's school system is a unitary one, except, in the view of the court below, with respect to the schools in the black residential section of Panama City, whose zone boundaries resulting in black-majority student bodies were drawn by those schools' black principals without regard to racial percentages.

The court below in the *Jefferson County* case (*United States* v. *Jefferson County Board of Education,* 372 F.2d 836, on rehearing in banc, 380 F.2d 385, certiorari denied *sub nom. Caddo Parish School Board* v. *United States,* 389 U.S. 840) drew a distinction between so-called *de facto*

segregation in the North and so-called *de jure* segregation in the South. But in situations involving school systems that are unitary except for the make-up of pupil populations that reflect residential patterns, such as this one and the *Pinellas County* case (No. 632, this Term), that distinction is demonstrably fallacious.

Residential segregation *de jure* emanating from legislative enactment has been recognized as illegal since 1917. *Buchanan* v. *Warley,* 245 U.S. 60. Residential segregation stemming from private agreement in the form of restrictive covenants was sustained by this Court as recently as 1926 (*Corrigan* v. *Buckley,* 271 U.S. 323), nor were such covenants outlawed until 1948. *Shelley* v. *Kraemer,* 334 U.S. 1. Significantly, the companion case in that same litigation (*McGhee* v. *Spies,* No. 87, Oct. T. 1947) arose in Michigan.

Consequently the segregated housing patterns out of which this and many other school-busing cases arise had until twenty years or so ago quite as complete a *de jure* basis in the North as in the South, and therefore plainly can not justify different treatment in different portions of the country. Indeed, the line of decision in the court below that began with *Jefferson County* involves one unedifying paradox compounded by another equally distasteful: First, an unequal sectional application of the Equal Protection Clause; second, classification of school children by race in order to end the evils of racial classification.

Sixth. It follows that the decision below runs counter to a solemn pronouncement made by the Congress in the exercise of a power specifically conferred by the Constitution, does a disservice to the cause of education, and, by directing that children of tender school age be shipped back and forth like so many bags of meal, simply to reflect particular racial percentages, commits a present act of obvious cruelty in the guise of rectifying an ancient wrong.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 1970.

APPENDIX A

OPINION BELOW

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 29369

JEAN CAROLYN YOUNGBLOOD, ET AL.,
Plaintiffs-Appellants,

UNITED STATES OF AMERICA,
Plaintiff-Intervenor-Appellant,

versus

BOARD OF PUBLIC INSTRUCTION OF
BAY COUNTY, FLORIDA, ET AL.,
Defendants-Appellees.

Appeals from the United States District Court for the Northern District of Florida

(July 24, 1970)

Before WISDOM, COLEMAN, and SIMPSON,
Circuit Judges.

WISDOM, Circuit Judge: The Board of Public Instruction of Bay County, Florida, faces fewer desegregation problems than do most school boards. This Court found, last December, that the freedom of choice plan in Bay County "has produced impressive results",[1] although "it fall[s] short of establishing a unitary school system".[2] As of February

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[1] This is one of the en banc school cases decided by this Court on December 1, 1969. Singleton v. Jackson Municipal Separate School District, 5 Cir. 19 , F.2d [No. 26,285,], *rev'd in part*, Carter v. West Feliciana Parish School Board, 38 U.S.L.W. 3265, January 14, 1970.

[2] Id.

6, 1970, there were only 3,028 blacks (17%) as compared with 14,629 whites (83%) enrolled in public schools.[3] There are only three schools (Rosenwald Junior High and Harris and Patterson elementary schools) that pose a serious problem. These were originally built to serve Negroes in a Negro residential area in Panama City, but the area is not extensive and the combined enrollment of pupils in these schools is only 1,413 or less than seven per cent of the total school population of the district. There is no serious busing problem.[4] Bay County, located in the Florida panhandle, has a population of 70,000. Most of its residents and schools are in the Panama City area.

After the Supreme Court's holding in *Carter* v. *West Feliciana Parish School Board,* 1970, U.S. , S.Ct., 24 L.Ed. 2d 477, a companion case to this case, and after remand of this case to the district court, the School Board and Health, Education, and Welfare Department filed desegregation plans. HEW acted through the Florida School Desegregation Consulting Center, University of Miami. The Center is partially funded by HEW and works with the Office of Education in school desegregation matters within the State of Florida to devise desegrega-

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[3] The Bay County school system is composed of 2 senior high schools, 4 junior high schools, 19 elementary schools and 1 vocational school.

[4] The record is not fully developed on the amount of transportation required under the two plans. The Superintendent testified that implementation of the HEW plan would require the busing of 897 students more than the 5,134 being bused under free choice. However, of the students being bused, only 3,117 lived more than 2 miles from school and so were required by Florida law to be transported.

In this regard, the record indicates that Bay County transported 6,297 students in 1968-69. For that year, only four schools in the system had no transported students. Harris was the only Negro school without bused students. The system currently operates 45 buses.

tion plans. A plan was formulated by a team from the Center, headed by Dr. Gordon Foster of the University of Miami, who is Director of the Center, and composed of eleven staff members, and nine special consultants, including educators from two other Florida school districts and from faculties of several universities both in Florida and in other states.[5]

The Board filed objections to the HEW plan and on January 14 filed a proposed plan which called for the conversion of the three remaining black schools to special centers and the assignment of regular black students to white schools. On January 26, the day before the hearing in the district court, the school board filed an Amended Proposed Plan, which provides for geographic attendance zones for all schools of the system. This Amended Plan stated that the Board had formally rescinded its previous plan.

Under all three plans, the school board would move from a free choice system to a geographic zoning system. The essential difference in the plans is that under the Board's plan there would be little desegregation in the remaining

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[5] The desegregation plan prepared by the Florida School Desegregation Consulting Center (HEW) had three key objectives:

(1) Moving the Bay County schools from a freedom of choice assignment pattern at the junior and senior high and elementary grade levels to assignments by geographic zones at all levels;

(2) Desegregating the student bodies at the three schools which were currently all-black or nearly so—Harris Elementary, 100% black; Patterson Elementary, 99.7% black; and Rosenwald Junior High, 100% black; and

(3) Desegregating the schools in such a manner as to minimize additional transportation costs and at the same time lessen the probability of "white flight" or the transfer of students to private schools.

Negro schools[6] and for at least one of these schools it appears the zone was drawn in a manner that restricts desegregation. In contrast, under the HEW plan an affirmative effort is made to desegregate the three schools and to do so in such a manner as to "minimize additional transportation costs and at the same time lessen the probability of 'white flight' or the transfer of students to private schools."[7]

We turn now to the three problem schools, traditionally all-Negro. Rosenwald, which originally served grades 7-12, has a capacity for 1,000 students. Since the high school grades were phased out, the school has served only 350 Negro junior high students. At the same time the three white junior highs have been filled to capacity for several years. However, rather than assign white students to Rosenwald to relieve overcrowding, the Board established seventh grades at two white elementaries, Millville and Hutchison Beach, which enroll about 450 junior high age students.

The Board's zone for Rosenwald is not based on the school's full capacity, but rather duplicates the limited

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[6] The Superintendent testified that the zones for the black schools were drawn by the principals of these schools and were drawn without regard to race. He testified no attempt was made to determine how many blacks and whites were in each zone; that no attempt was made to draw zones so as to have both blacks and whites represented; and that no attempt was made to draw the zones so they would affirmatively promote desegregation.

[7] The effect of the two plans on the three traditionally Negro schools is shown by the following chart:

School	*Cap.*	*9/1969 Enrollment*			*HEW Proj. Enrollment*			*Bd's Proj. Enrollment*			*2/1970 Enrollment*		
		W	*N*	*T*	*W*	*N*	*T*	*W*	*N*	*T*	*W*	*N*	*T*
Rosenwald	1000	0	377	377	629	191	820	127	378	505	75	275	350
Harris	650	0	595	595	256	82	338	16	593	609	3	472	475
Patterson	680	2	626	628	324	84	408	171	485	656	115	473	508

enrollment of the school under free choice. Thus, while the school has a capacity of 1,000, the Board's zone was drawn to fill the school to half that number (505), and the actual enrollment in February (350) constitutes about ⅓ of the school's full capacity. The effect is to restrict the geographic area which the school serves, with the result that the school remains predominantly black.

In contrast, HEW proposed zoning 820 students into Rosenwald, about 180 less than the full capacity (which would leave space for some special classes or projects, such as the Educable Mentally Retarded Unit). Thus, the attendance zone would necessarily cover a larger geographic area, with the result that a greater number of white students would be within the Rosenwald zone. There would be sufficient space in the junior highs for the special seventh grades at Millville and Beach elementaries to be absorbed in the regular junior high program.

Under the Board's plan, Patterson and Harris would each serve grades K-6. Because of residential patterns both schools remain majority Negro. As of February 6, Harris had only 3 of a projected 16 whites enrolled, while Patterson was attended by 115 of a projected 171 whites.

In order to reduce the probability of white flight from these schools and their re-segregation, HEW proposed that Harris and Patterson schools be paired with nearby white elementaries. Under this proposal, Patterson would be paired with Millville (approximately 2 miles away) in a single geographic zone. Harris would be paired with Northside, approximately 2½ miles away, in a similar large zone.

All students within each zone would attend grades K-3 at the white school, and grades 4, 5, and 6 at the Negro school. Under such a combination geographic zone-pairing assignment provision, each school would have a substantial white enrollment. HEW projected that under its proposed zones, each school would be about 75% white.

As Florida law requires students living more than two miles from their school to be transported, the pairing

proposal would necessitate the transportation of a number of students. Of these schools, only Patterson has had a substantial number of its students transported in the past.

At the elementary level, HEW also proposed retaining two "transportation islands", or small non-contiguous zones, previously employed by the Board to implement district court orders directing that Negro schools be closed and their students reassigned to white schools. The limited number (not more than 71) Negro students from these small zones would be transported to two traditionally white elementaries. However, even if these students were assigned to the schools nearest their homes, the HEW projections indicate it would not affect the majority white enrollments at the schools.

Despite the circumstances which suggest that a plan could be devised which would eliminate vestiges of discrimination in Bay County, the Board adopted a student assignment plan that to a great extent perpetuates "the comfortable security of the old, established discriminatory pattern". *Monroe* v. *Board of Commissioners,* 1968, 391 U.S. 450, at 459, 88 S.Ct. 1700, 20 L.Ed. 2d 733.

According to the testimony of the Superintendent at the February hearing only 385 of the approximately 2530 Negro junior high and elementary students would be zoned into white schools under the Board's plan. This number is substantially less than the number of Negro students enrolled in these schools in September 1969 under the free choice plan. Thus, strict adherence to the geographic zones would have the effect of trapping Negro students in Negro schools. However, the Board adopted the policy of assigning to white schools all Negro students who had chosen to attend these schools under free choice, regardless of the location of their residences. Thus, the 1286 Negro students shown in the February report to be enrolled in white schools represents not only those zoned into white schools, but also all others who had selected them under free choice. At the same time, the three remaining Negro schools have enrollments of 60% - 99% black.

The report with the court shows that as of February 6, of the 314 whites which the Board projected would be zoned into black schools only 193 of these were actually in attendance. This is hardly unexpected in light of the fact that in the past no whites (other than a handful of kindergarten students) had chosen to attend Negro schools, despite the Board's proposal to improve Negro schools in order to attract whites.

As we see it, the zone for Rosenwald should be based on the full capacity or nearly full capacity of that school, as proposed by HEW. (But see the last paragraph of this opinion.) Such a zone could, as the HEW proposal suggests result in a majority white student population at the school. At the elementary level, the Board made no affirmative effort to desegregate the two remaining Negro schools. Indeed, as the Superintendent testified, no attempt was made to determine the effect the Board's zones would have on desegregation and the Board rejected reasonably available alternatives proposed by HEW which would have totally desegregated these schools.

The record contains suggested alternatives available to the Board which would totally eradicate all vestiges of the dual school system and deal with the problems of the flight of white parents and resegregation. This could be accomplished at the junior high level simply by drawing a zone on the basis of the full capacity of the school. At the elementary level, the Negro schools could be paired with white schools.

This Court requires school boards to draw zone lines so as to affirmatively promote desegregation of racially dual school systems. *Valley* v. *Rapides Parish School Board,* 5 Cir. 1970, F.2d [No. 29,237, March 6, 1970;] *United States* v. *Indianola Municipal Separate School District,* 5 Cir. 1969, 410 F.2d 626 cert. denied 38 L.W. 3254; *United States* v. *Greenwood Municipal Separate School District,* 5 Cir. 1969, 406 F.2d 1086; *Davis* v. *Board of School Commissioners of Mobile County,* 5 Cir. 1968, 393 F.2d 690,

694; *Henry* v. *Clarksdale Municipal Separate School District,* 5 Cir. 1969, 409 F.2d 682; *United States* v. *Choctaw County Board of Education,* 5 Cir. 1969, 417 F.2d 838; *Braxton* v. *Board of Public Instruction of Duval County,* 5 Cir. 1968, 402 F.2d 900. We approve the pairing of schools to promote desegregation. See, e.g., *Hall* v. *St. Helena Parish,* 5 Cir. 1969, 417 F.2d 801 at 809; *United States* v. *Choctaw County,* 5 Cir. 1969, 417 F.2d 838 at 842; *Dowell* v. *Board of Education of Oklahoma City,* 10 Cir. 1967, 375 F.2d 158. See also *Green* v. *County School Board of New Kent County,* , 391 U.S. at 442, n. 6; *Raney* v. *Gould School District,* , 391 U.S. at 448.

This Court's decisions in *United States* v. *Greenwood Municipal Separate School Dist.,* 5 Cir. 1969, 406 F.2d 1086; *Henry* v. *Clarksdale Municipal Separate School Dist.,* 5 Cir. 19 , 409 F.2d 682, *cert. denied,* 1969, 396 U.S. 940; and *United States* v. *Indianola Municipal Separate School Dist.,* 5 Cir. 1969, 410 F.2d 626, *cert. denied,* 1970, 24 L.Ed. 2d 503; accord, *Valley* v. *Rapides Parish School Bd.,* 5 Cir. 1970, F.2d [No. 29,337, March 6, 1970], makes abundantly clear that a school board does not meet its constitutional duty to disestablish the dual school system by drawing geographic attendance zones according to every other possible criterion except promotion of desegregation. Without such a consideration of a plan's ability to effect desegregation, eographic zoning is no more acceptable constitutionall, than freedom of choice.

In Greenwood, we said:

> Counsel for the school board argues that a geographic zone does not contravene the Fourteenth Amendment if it is drawn according to objective criteria and not along racial lines. This assessment of the equal protection clause as it applies to school desegregation fails to take into account the *affirmative duty* of school boards in this Circuit to abolish state-compelled educational segregation and establish in its place a unitary system. This affirmative duty was spelled out in *Jefferson* and reaffirmed in *Green* and *Raney.*

Id. at 1093.

And in *Henry* v. *Clarksdale,* this Court declared a geographic zoning plan constitutionally impermissible where it was shown to freeze in past discrimination and to be formulated with concern for disturbing the patrons as little as possible in their established school attendance patterns rather than effecting desegregation. In a context where residential segregation was apparently present, the Court indicated that that factor was irrelevant to the constitutional issues:

> . . . The ultimate inquiry is not whether the school board has found some rational basis for its action, but whether the Board is fulfilling its duty to take affirmative steps, spelled out in *Jefferson* and fortified by *Green,* to find realistic measures that will transform its formerly de jure dual segregated school system into a unitary, non-racial system of public education.

Id. at 687.

This Court went on to hold that basic criteria such as maximum utilization of school buildings, density of population, proximity of pupils to schools, natural boundaries and welfare of students could be used by school boards to determine zoning configuration, except where the net effect would be to freeze in past discrimination. In no event were "historical boundaries" — those that historically separated white and Negro residential areas — to be considered natural boundaries in arriving at attendance zones. *Id.,* 687-688. But these were not the only criteria necessary to meet the constitutional requirements. As this Court indicated:

> . . . [T]here is a sixth basic criterion . . . promotion of desegregation. *Jefferson, Stell, Davis, Braxton, Polk County, Carr, Bessemer, Adams, Graves* and *Greenwood* and other cases decided by this Court, and now Green v. County School Board of New Kent County, require school authorities to take affirmative action that will tend to eradicate all vestiges of the dual system. For example, given a choice of alternatives, a school board should draw zone lines, locate new schools, consolidate schools, change feeder patterns,

> and resort to other measures that will reduce the effect of past patterns tending to maintain segregation (or token desegregation). "Where the board is under compulsion to desegregate the schools . . . we do not think that drawing zone lines in such a manner as to disturb the people as little as possible, is a proper factor in rezoning the schools."

Id., at 688.

We reiterate what was said in *United States* v. *Jefferson County*, 5 Cir. 1966, 372 F.2d 836, 876.

> The Constitution is both color blind and color conscious. To avoid conflict with the equal protection clause, a classification that denies a benefit, causes harm, or imposes a burden must not be based on race. In that sense, the Constitution is color blind. But the Constitution is color conscious to prevent discrimination being perpetrated and to undo the effects of past discrimination. The criterion is the relevancy of color to a legitimate governmental purpose.

At this point, and perhaps for a long time, true nondiscrimination may be attained, paradoxically, only by taking color into consideration. *Accord, Board of Public Instruction of Duval County* v. *Braxton*, 5 Cir. 1968, 402 F.2d 900; *United States* v. *Board of Public Instruction of Polk County*, 5 Cir. 1968, 395 F.2d 66; *Wanner* v. *County School Bd. of Arlington County*, 4 Cir. 1966, 357 F.2d 452; *Dowell* v. *School Bd. of Oklahoma City*, W.D. Okla. 1965, 244 F. Supp. 971, *aff'd* 375 F.2d 158 (10th Cir.)., *cert. denied*, 1967, 389 U.S. 847.

We again note that the Bay County School Board has "produced impressive results" in desegregation. At the same time, we have concluded that it has not gone far enough. We reverse and remand this case for proceedings consistent with this opinion. We suggest to the district court that it would be helpful to order that the team from HEW work with school officials to revise the geographic

zones proposed by HEW on the basis of the up to date pupil locator maps. These proposals should then be filed with the court and the parties permitted to file any objections or proposed modifications, after which the district court should hold a prompt hearing and shall approve a more effective desegregation plan to be put into effect in September 1970.

In the light of up-dated information and other pertinent facts, HEW and the Board should explore the feasibility of retaining the classrooms especially designed for the Educable Mentally Retarded Unit at Rosenwald School. Consideration should also be given to retention of the County-Wide Education Media Center at Rosenwald or its relocation at another school.

The judgment is REVERSED and REMANDED for proceedings consistent with this opinion.

COLEMAN, Circuit Judge, Concurring in part and dissenting in part:

In this case, the Department of Health, Education and Welfare recommended that the Bay County Educable Mentally Retarded Program, established in 1967 at Rosenwald, be relocated. The majority of this Panel directs that the feasibility of retaining this program at Rosenwald be explored. In this I heartily concur.

In all other particulars I respectfully dissent. It seems to me that this decision again allows statistics, in isolation, to outweigh all other considerations. I would hold that Bay County in fact does have a public school system in which no child is deprived of the right to attend a school on account of his race or color.

I would not further disrupt this school system solely to attain a more evenly distributed racial balance, which, as I understand it, is not required by the Constitution if the school system is a unitary one.

I would affirm the Judgment of the District Court.

APPENDIX B

ORDER DENYING REHEARING

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

September 11, 1970

Edward W. Wadsworth
Clerk

Room 408-400 Royal St.
New Orleans, La. 70130
(504) 527-6514

To All Parties Listed Below

Re: No. 29369—Youngblood, et al v. Board of Public Instruction of Bay County, Fla., et al

Gentlemen:

You are hereby advised that the Court has today entered an order denying the Petition ( ) for Rehearing in the above case. No opinion was rendered in connection therewith. See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Coleman, Circuit Judge, dissents.

Very truly yours,

Edward W. Wadsworth,
Clerk

By Frances Wolff
Deputy Clerk

APPENDIX C

NEW PLAN DIRECTED BY DISTRICT COURT PURSUANT TO DECISION BELOW

1. District Court's Order

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
MARIANNA DIVISION

Marianna Civil Action No. 572

JEAN CAROLYN YOUNGBLOOD *et al, Plaintiffs,*

UNITED STATES OF AMERICA, *Plaintiff-Intervenor,*

VS.

THE BOARD OF PUBLIC INSTRUCTION OF BAY COUNTY, FLORIDA *et al, Defendants.*

ORDER

Pursuant to the order of this Court entered in the above styled cause on August 3, 1970, representatives of the Office of Education, Department of Health, Education and Welfare met with defendant school officials to attempt to work out a plan to convert the existing Bay County system to a unitary system in light of the July 24, 1970 decision of the United States Court of Appeals for the Fifth Circuit. The defendants and officials of the Office of Education were unable to agree to a desegregation plan. Therefore, the defendant school board submitted a proposed plan to the Court and HEW prepared and submitted its proposed plan. The Court held a pretrial conference followed by a hearing in open Court to consider these plans and held that both plans were unacceptable. An alternate plan was presented to the Court which all parties agree can establish a unitary school system in Bay County, Florida, a copy being attached hereto and made a part hereof.

The Court having considered said plan, it is hereby ordered:

1. That the attached plan is hereby approved and shall be implemented by the Bay County School Board immediately.

2. The school board shall prepare and file in this Court with copies to all counsel a report on the usual forms heretofore required in this case by this Court, on or before September 15, 1970.

3. The attached plan is hereby modified and amended to substitute a new zone for the Parker Elementary School zone as follows:

> Beginning at the intersection of Martin Bayou Bridge and Cherry Street, East on Cherry Street to U. S. Highway 98, South on U. S. Highway 98 to Hickory Street, East on Hickory Street and Hickory Street Extension to mouth of Bailey Bayou, East down the middle of Bailey Bayou to Callaway Bayou, South along the center of Callaway Bayou to East Bay, East through the center of East Bay, East through the center of East Bay to Bay-Gulf County Line, South on the County Line to the Gulf of Mexico, West along the shoreline of the Gulf of Mexico to the easterly border of Tyndall Air Force Base Reservation, North along easterly border of the Tyndall Air Force Base Reservation to East Bay, West through the center of East Bay and St. Andrew Bay to the mouth of Martin Bayou, North along the center line of Martin Bayou to point of beginning.

4. The Court reserves jurisdiction of this cause to evaluate the plan in practice to determine that a unitary school system is established in Bay County, Florida.

5. All other provisions of this Court's order of January 30, 1970, except as herein specifically modified, shall remain in full force and effect.

DONE and ORDERED in Chambers in Tallahassee, Florida, this 14th day of August, 1970.

/s/ David L. Middlebrooks
David L. Middlebrooks
United States District Judge

2. District Court's Plan

[Caption Omitted]

PROPOSED DESEGRATION PLAN UTILIZING AREA SIXTH GRADE CENTERS AT HARRIS ELEMENTARY SCHOOL AND PATTERSON ELEMENTARY SCHOOL

Prepared by:

THE BAY COUNTY SCHOOL BOARD
(FORMERLY
THE BOARD OF PUBLIC INSTRUCTION
OF BAY COUNTY, FLORIDA)

August 14, 1970

BAY COUNTY SCHOOL BOARD REVISED JUSTICE DEPARTMENT PLAN

August 1970

A. D. Harris Area 6th Grade Center

All students and teachers from the sixth grades of the following elementary schools shall attend A. D. Harris Area 6th Grade Center:

SCHOOL	NUMBER OF STUDENTS
Cherry Street	98
Cove	64
A. D. Harris	71
Lucille Moore	95
Northside	77
Oakland Terrace	83
St. Andrew	36
TOTAL	524

White	385	73%
Black	139	27%
Total	524	100%
Capacity	527	

Total K-5 Students Transferring Out 423

The Board shall assign the pupils and teachers of grades K-5 at Harris to the elementary schools listed above. Adjoining school zones will be adjusted and transportation islands developed in re-assigning the K-5 students to the nearest school center.

BAY COUNTY SCHOOL BOARD REVISED JUSTICE DEPARTMENT PLAN

August 1970

Oscar Patterson Area Sixth Grade Center

All students and teachers from the sixth grades of the following elementary schools shall attend the Oscar Patterson Area Sixth Grade Center:

SCHOOL	NUMBER OF STUDENTS
Callaway	110
Cedar Grove	61
Millville	54
Parker	111
Patterson	75
Springfield	131
TOTAL	542

White	469	87%
Black	73	13%
Total	542	100%
Capacity	618	

Total K-5 Students Transferring Out 508

The Board shall assign the pupils and teachers of grades K-5 at Patterson to the elementary schools listed above. Adjoining school zones will be adjusted and transportation islands developed in re-assigning the K-5 students to the nearest school center.

BAY COUNTY SCHOOL BOARD REVISED JUSTICE DEPARTMENT PLAN

August 1970

JUNIOR HIGH SCHOOLS

Everitt Junior High School

Beginning at the intersection of East Avenue and Easterly extension of 19th Street, proceeding easterly along the easterly extension of 19th Street to the Bay-Gulf County Line, South on the County Line to the Gulf of Mexico, West along the shoreline of the Gulf of Mexico to the Eastern border of Tyndall Air Force Base Reservation, North along the eastern border of the Tyndall Air Force Base Reservation to East Bay, West through the center of East Bay and St. Andrew Bay to the mouth of Watson Bayou, North up the center of Watson Bayou to Business Highway 98, East on Business Highway 98 to East Avenue, North on East Avenue to point of beginning.

White	996	91%
Black	103	9%
Total	1099	100%
Capacity	1465	

Mowat Junior High School

Begin at a point on the Gulf and Bay County Line, on a line projected easterly from the junction of Highway 231 and State Road 77, proceed west to the junction of U. S. Highway 231 and State Road 77, south on Highway 231 to the junction of the St. Andrew Bay Railroad. Follow St. Andrew Bay Railroad westerly to the east shore of St. Andrew Bay, west to a projected point in the center of Hathaway Bridge, northerly through the center line of North Bay to a center line of the junction of North Bay and West Bay, proceed through the center line of West Bay to a projected line east and west from Breakfast

Point, west to the Walton County Line, proceed north and clockwise to Washington, Jackson, Calhoun, and Gulf Counties to a point of beginning.

White	1161	97%
Black	41	3%
Total	1202	100%
Capacity	1184	

BAY COUNTY SCHOOL BOARD REVISED JUSTICE DEPARTMENT PLAN

August 1970

JUNIOR HIGH SCHOOLS

Jinks Junior High School

Beginning at a point where Business Highway 98 crosses Watson Bayou, proceed west on Business Highway 98 to Cove Boulevard, North on Cove Boulevard to Highway 231, Southwest on Highway 231 to the junction of the St. Andrew Bay Railroad, follow St. Andrew Bay Railroad westerly to the east shore of St. Andrew Bay, West to a projected point in the center of Hathaway Bridge, Northerly through the center line of North Bay to a center line to the junction of North Bay and West Bay, proceed through the center line of West Bay to a projected line east and west from Breakfast Point, West to the Walton County Line, South on the Walton County Line to the Gulf of Mexico, follow the shoreline of the Gulf of Mexico easterly to St. Andrew Bay, East through St. Andrew Bay to the projected center point of Watson Bayou, Northerly in Watson to the point of beginning.

White	1111	77%
Black	332	23%
Total	1443	100%
Capacity	1670	

Rosenwald Junior High School

Beginning at the intersection of Cove Boulevard and Business Highway 98, north on Cove Boulevard to intersection of Bay Line Railroad, east on an easterly extension of 19th Street to East Avenue, south on East Avenue to Business Highway 98, west on Business Highway 98 to the point of beginning. All junior high school students residing on Tyndall Air Force Base Reservation will attend Rosenwald Jr. High School.

White	359	56%
Black	284	44%
Total	643	100%
Capacity	663	

The Board shall adjust zones and assignments in accordance with the capacity of this school center, provided a majority white regular Grades 7-9 enrollment is maintained at Rosenwald; provided further, that the Board is not required to move the existing Media Center and Special Education Center from Rosenwald.

The Board shall have the authority to adjust zones and assignments in accordance with the capacity of each school center in the county, provided such adjustments do not affect the desegregation intent of this order.

The Board shall have the right to allow any student to attend a school outside their attendance zone for compelling physical and emotional disabilities.

The Board shall endeavor to maintain the current student capacity at Rosenwald.

APPENDIX D

LEGISLATIVE HISTORY OF THE ANTI-BUSING PROVISOS OF THE CIVIL RIGHTS ACT OF 1964

1. The measure that became the Civil Rights Act of 1964 was recommended to Congress by President Kennedy. He requested Congress to "assert its specific constitutional authority to implement the 14th Amendment" (H.R. Doc. 124, 88th Cong., 1st sess., June 19, 1963, p. 6) with respect to achieving desegregation in the public schools, first by accelerating the litigation process, second by a program of technical and financial assistance to school districts "engaged in the process of meeting the *educational problems flowing from desegregation or racial imbalance* * * *" (*id.*, p. 7; italics added).

2. The first version of the bills introduced immediately thereafter and designed to effectuate the Presidential message (H.R. 7152, Sen. 1731; both 88th Cong., 1st sess.) had identical provisions. Title III of each, entitled "Desegregation of Public Education," contained no less than five subsections specifically looking to the correction of racial imbalance (italics added):

> "SEC. 303. (a) The commissioner is authorized, upon the application of any school board, State, municipality, school district, or other governmental unit, to render technical assistance in the preparation, adoption, and implementation of plans for the desegregation of public schools or other plans designed to deal with *problems arising from racial imbalance* in public school systems. Such technical assistance may, among other activities, include making available to such agencies information regarding effective methods of coping with *special educational problems occasioned by desegregation or racial imbalance*, and making available to such agencies personnel of the Office of Education or other persons specially equipped to advise and assist them in coping with such problems.
>
> "(b) The Commissioner is authorized to arrange, through grants or contracts, with institutions of higher education for the operation of short-term or regular

session institutes for special training designed to improve the ability of teachers, supervisors, counselors, and other elementary or secondary school personnel to deal effectively with special educational problems occasioned by desegregation or *measures to adjust racial imbalance in public school systems.* * * *

"SEC. 304 (a) A school board which has failed to achieve desegregation in all public schools within its jurisdiction, or a school board which is confronted with *problems arising from racial imbalance* in the public schools within its jurisdiction, may apply to the Commissioner, either directly or through another governmental unit, for a grant or loan, as hereinafter provided, for the purpose of aiding such school board in carrying out desegregation or in dealing with *problems of racial imbalance.*

"(b) The Commissioner may make a grant under this section, upon application therefor, for—

"(1) the cost of giving to teachers and other school personnel inservice training in dealing with *problems incident to desegregation or racial imbalance in public schools;* and

"(2) the cost of employing specialists in *problems incident to desegregation or racial imbalance* and of providing other assistance to develop understanding of these problems by parents, schoolchildren, and the general public.

"(c) * * * In determining whether to make a grant, and in fixing the amount thereof and the terms and conditions on which it will be made, the Commissioner shall take into consideration * * * the nature, extent, and gravity of its *problems incident to desegregation or racial imbalance,* and such other factors as he finds relevant."

3. Sen. 1731 never got off the ground, despite its sponsorship by no less than 45 senators, while H.R. 7152 was, following extensive hearings, completely rewritten in committee. There was reported out an entirely new measure, see H.R. Rep. 914, 88th Cong., 1st sess., in which former Title III was renumbered Title IV, and in which every mention of "racial imbalance" was deleted. The justifi-

cation for such deletion was set forth in the additional views of Messrs. McCulloch of Ohio, Lindsay of New York, Cahill of New Jersey, Shriver of Kansas, MacGregor of Minnesota, Mathias of Maryland, and Bromwell of Iowa (*id.*, Part 2, pp. 21-22):

> "The committee failed to extend this assistance to problems frequently referred to as 'racial imbalance' as no adequate definition of this concept was put forward. The committee also felt that this could lead to the forcible disruption of neighborhood patterns, might entail inordinate financial and human cost and create more friction than it could possibly resolve."

Even so, the elimination of the references to racial imbalance did not satisfy one of the dissenting members, who complained (H.R. Rep. 914, *supra*, at p. 84) that "this action [i.e., such elimination] is a matter of 'public relations' or semantics, devised to prevent the people of the United States from recognizing the bill's true intent and purpose. The administration apparently intends to rely upon its own construction of 'discrimination' as including the lack of racial balance as distinguished from a statutory reference to 'racial imbalance' * * *."

4. As reported out by the Judiciary Committee on November 20, 1963 (H.R. 914, *supra*, at p. 5), Section 401(b) provided that

> " 'Desegregation' means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin."

On January 31, 1964, in the course of an explanation of the committee substitute, Chairman Celler of the Judiciary Committee said (110 Cong. Rec. 1518):

> "There is no authorization for either the Attorney General or the Commissioner of Education to work toward achieving racial balance in given schools. Such matters, like appointment of teachers and all other internal and administrative matters, are entirely in the hands of the local boards. This bill does not change that situation."

On February 6, 1964, Mr. Cramer of Florida, who had earlier expressed concern lest the bill as rewritten by the Judiciary Committee had failed to eliminate racial balancing from its proposals for desegregation (110 Cong. Rec. 1598), moved an amendment to provide that "'desegregation' shall not mean the assignment of students to public schools in order to overcome racial imbalance." Chairman Celler accepted that amendment (110 Cong. Rec. 2280), and, as thus amended, Section 401(b) was adopted by the House.

5. The House passed H.R. 7152 on February 10, 1964 (110 Cong. Rec. 2805). In the Senate, the measure was placed on the calendar without reference to committee (*id.* 3719, Feb. 26), and was taken up for consideration on March 26 (*id.* 6417). As is well known, three months of debate ensued.

Because of the absence of committee action, H.R. 7152 was rewritten by the joint leadership in the course of the debate, and on May 26, Amendment No. 656 in the nature of a substitute was offered by Senators Dirksen (Minority Leader), Mansfield (Majority Leader), Humphrey (Majority Whip), and Kuchel (Minority Whip) (110 Cong. Rec. 11926). Included in Amendment No. 656 was a new proviso to Section 407(a) reading as follows (*id.* at 11929):

> "provided that nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards."

This proviso did not appear either in H.R. 7152 as reported out by the House Judiciary Committee (H.R. Rep. 914, 88th Cong., 1st sess., p. 7) or in H.R. 7152 as it reached the Senate. Chronology indicates that the proviso was drafted to allay the fears of numerous opponents of the measure as a whole, who had earlier argued that, as it

passed the House, it would permit the transportation of school children back and forth to achieve racial balance (110 Cong. Rec. 5858-62, 6820, 6839-41, 8357-58, 8615-16, 8621).

6. On June 2, Senator Russell of Georgia introduced Amendment 766, which had two parts. The first proposed to strike from Section 401(b) the House-approved Cramer amendment providing that desegregation was not to mean overcoming racial imbalance, the second proposed to delete the anti-busing proviso to Section 407(a) that had first appeared in the Dirksen-Mansfield-Humphrey-Kuchel substitute (110 Cong. Rec. 12436-37). Senator Russell argued at some length that deleting the proviso would eliminate the sectional aspects of the pending bill and would give the Attorney General authority to integrate outside the South. Senator Russell contended that, with the proviso included, the Attorney General would act only in the South, and the courts would be powerless to touch *de facto* segregation in the North. (110 Cong. Rec. 12438-41.)

7. Two days later, Senator Humphrey undertook to explain Title IV of the bipartisan substitute contained in Amendment 656 (110 Cong. Rec. 12706 *et seq.*). He said on the matter now in issue (*id.* at 12714):

> "Next, changes are made to resolve doubts that have been expressed about the impact of the bill on the problem of correcting alleged racial imbalance in public schools. The version enacted by the House was not intended to permit the Attorney General to bring suits to correct such a situation, and, indeed, said as much in section 401(b). However, to make this doubly clear, two amendments dealing with this matter are proposed.
>
> "The first provides that nothing in title IV 'shall empower any court' or official of the United States to issue 'any order' seeking to achieve 'a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance or otherwise enlarge the existing power of the

court to insure compliance with constitutional standards.' This addition seeks simply to preclude an inference that the title confers new authority to deal with 'racial imbalance' in schools, and should serve to soothe fears that title IV might be read to empower the Federal Government to order the busing of children around a city in order to achieve a certain racial balance or mix in schools.

"Furthermore, a new section 410 would explicitly declare that 'nothing in this title shall prohibit classification and assignment for reasons other than race, color, religion, or national origin.'

"Thus, classification along bona fide neighborhood school lines, or for any other legitimate reason which local school boards might see fit to adopt, would not be affected by title IV, so long as such classification was bona fide. Furthermore, this amendment makes clear that the only Federal intervention in local schools will be for the purpose of preventing denial of equal protection of the laws."

Shortly thereafter this additional colloquy took place (*id.* at 12715, 12717):

"Mr. BYRD of West Virginia. Can the Senator from Minnesota assure the Senator from West Virginia that under title VI school children may not be bused from one end of the community to another end of the community at the taxpayers' expense to relieve so-called racial imbalance in the schools?

"Mr. HUMPHREY. I do. * * * (p. 12717) I should like to make one further reference to the Gary case.[1] This case make it quite clear that while the Constitution prohibits segregation, it does not require integration. The busing of children to achieve racial balance would be an act to effect the integration of schools. In fact, if the bill were to compel it, it would be a violation, because it would be handling the matter on the basis of race and we would be transporting children because of race. The bill does not attempt to integrate the schools, but it does attempt to eliminate

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[1] *Bell* v. *School City of Gary, Indiana,* 324 F.2d 209 (C.A. 7), certiorari denied, 377 U.S. 924.

segregation in the school systems. The natural factors such as density of population, and the distance that students would have to travel are considered legitimate means to determine the validity of a school district, if the school districts are not gerrymandered, and in effect deliberately segregated. The fact that there is a racial imbalance per se is not something which is unconstitutional. That is why we have attempted to clarify it with the language of section 4."[2]

8. Senator Dirksen, another co-sponsor, explained Amendment 656 on the following day (110 Cong. Rec. 12817 *et seq.*). Thereafter, on June 10, Senator Dirksen introduced Amendment 1052, which was in the nature of a substitute for Amendment 656, designed to include Senator Morton's amendment on jury trials (110 Cong. Rec. 13310); the proviso to Sec. 407(a), see *id.* at 13312, was left unchanged from what it had been in the earlier version.

9. On June 15, 1964, Senator Russell called up his Amendment No. 766, to strike out both anti-busing provisos, the Cramer amendment to Sec. 401(b) as well as the Dirksen-Mansfield-Humphrey-Kuchel proviso in Sec. 407(a). In the time available to him—at this juncture the Senate had imposed cloture—he repeated the substance of what he had said nine days earlier, to the effiect that both provisos made the bill a measure directed solely against the South. On a roll-call vote, the Russell amendment was rejected, 18-71. (110 Cong. Rec. 13819-22.)

The remainder of the legislative process requires no special comment. Amendment 1052 was agreed to on June 17 by a vote of 76-18 (110 Cong. Rec. 14239), and the bill as thus amended passed the Senate on June 19, the final vote being 73-27 (*Id.* at 14511). The House ultimately concurred in the Senate amendment (*id.* 14631, 15869), and H. R. 7152 became law on July 2, 1964 (Pub. L. 88-352, 78 Stat. 241).

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[2] Presumably Title IV rather than section 4 was intended.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 784

THE BOARD OF PUBLIC INSTRUCTION OF BAY COUNTY, FLORIDA, ET AL., PETITIONERS

v.

JEAN CAROLYN YOUNGBLOOD, ET AL., AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1–A11) is not reported. The decision of the district court is also unreported.

JURISDICTION

The decision of the court of appeals was entered on July 24, 1970, and the mandate issued immediately. A timely petition for rehearing was denied on September 11, 1970. The petition for a writ of certiorari was filed on October 1, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

408-556—70

QUESTION PRESENTED

Whether the court of appeals correctly rejected the attendance zones in petitioners' school desegregation plan, which would effectively maintain three segregated schools, when feasible alternatives existed which, if adopted, would desegregate all schools.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Pertinent excerpts from the Fourteenth Amendment to the Constitution of the United States and the Civil Rights Act of 1964 are set forth at pages 3–4 of the petition.

STATEMENT

This case, involving the desegregation of schools in Bay County, Florida, was brought by private plaintiffs in 1963. The United States intervened in 1966 pursuant to Section 902 of the Civil Rights Act of 1964. 42 U.S.C. 2000h–2. The Bay County school system, which includes the city of Panama City, has approximately 17,934 students enrolled during the 1970–71 school year, of whom approximately 2,969 (18 percent) are black. Involved in this petition is the desegregation of three historically black schools (one junior high school and two elementary). All other schools in the system have been desegregated by order of the district court and are not in issue here.

On January 30, 1970, the district court ordered the implementation of a desegregation plan proposed by the school board which utilized geographic zones as

the method of student assignment.[1] The three traditionally black schools in question, Rosenwald Junior High School and Harris and Patterson Elementary Schools, are located in the Panama City portion of the district. Each of the three schools is located approximately 2-to-2½ miles from one or more traditionally white schools serving the same grades. The geographic zones for the two elementary schools were admittedly drawn without regard to the effect the zones would have on desegregation (Pet. 13). The zone for the junior high school was drawn to fill approximately half of the schools' capacity, with a resulting student enrollment that is very predominantly black. Under the plan approved by the district court, the February 1970 enrollment for the three schools was as follows:

School	February 1970 enrollment		
	White	Black	Total
Rosenwald Junior High School	75	275	350
Harris Elementary	3	472	475
Patterson Elementary	115	473	508

The court of appeals noted that an extant HEW plan, if adopted, would have effectively desegregated the three schools (Pet. App. A4),[2] and held the plan

[1] During the 1969–70 school year, the school district operated under a freedom of choice student assignment plan. During that school year, two of the three schools in question remained all black and the third enrolled two white students.

[2] The district court rejected a plan formulated by the Department of Health, Education and Welfare that would have established a larger attendance zone around the junior high school,

approved by the district court to be unacceptable (Pet. App. A3–A4). It concluded that the board had adopted a student assignment plan "that to a great extent perpetuates 'the comfortable security of the old, established discriminatory pattern,' " even though the record contained alternatives "available to the Board which would totally eradicate all vestiges of the dual school system and deal with the problems of the flight of white parents and resegregation" (Pet. App. A6–A7). The court of appeals reversed and remanded the case to the district court with the suggestion that the school district work with HEW to revise the geographic zones proposed by HEW on the basis of current demographic information. The district court was ordered to hold a hearing and ap-

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bringing that school closer to its capacity, and would have paired the two elementary schools with adjoining white schools each approximately 2-to-2½ miles distant. The projected enrollment under the HEW plan was as follows:

School	Projected enrollment		
	White	Black	Total
Rosenwald Junior High School	629	191	820
Harris Elementary	256	82	338
Patterson Elementary	324	84	408

There were also two other plans in the record that were rejected by the district court: a plan formulated by the school board which would convert the three black schools to special centers and assign the students formerly enrolled in those schools to traditionally white schools and a plan proposed by the United States that would convert the two black elementary schools to sixth grade centers serving all sixth graders in the Panama City area. The black elementary students in grades 1–5 would be assigned to traditionally white elementary schools.

prove a more effective desegregation plan to be implemented in September 1970 (Pet. App. A10–A11).

On remand the district court approved a desegregation plan that modified the zone line of Rosenwald Junior High School and created sixth grade centers at Harris and Patterson Elementary Schools.[3] The enrollment at each of these schools as of September 10, 1970, was as follows:[4]

School	Enrollment		
	White	Black	Total
Rosenwald Junior High	400	280	680
Harris Elementary	374	144	518
Patterson Elementary	427	88	515

ARGUMENT

The issue presented is whether the plan previously approved by the district court disestablished the dual school system.[5] As the court of appeals noted, under that plan the attendance zone lines for the elementary schools were drawn without regard to their impact on desegregation and the zone lines for the junior high school were drawn so as to underutilize the facility

[3] The plan approved by the district court constituted a revised version of a plan drawn by the Department of Justice (see note 2, *supra*). Revisions were formulated by the school district and all parties agreed that the plan would establish a unitary school system (Pet. App. A13, A15, A17, A19).

[4] Since there has been no evidentiary hearing concerning the court-ordered plan, the record contains no information concerning the number of students transported under the plan.

[5] Insofar as petitioners are complaining of orders of the district court rendered subsequent to the decision of the court of appeals (see Pet. 2, 9–10) they are, of course, before the wrong court. 28 U.S.C. 1291.

when its full utilization would have resulted in desegregation. We believe that the court of appeals was correct in holding that the plan was constitutionally inadequate, in the face of feasible alternative plans which would desegregate the three schools. The court's decision, of course, merely follows this Court's directions in *Green* v. *County School Board,* 391 U.S. 430, 439:

> The obligation of the district courts, as it always has been, is to assess the effectiveness of a proposed plan in achieving desegregation. There is no universal answer to complex problems of desegregation; there is obviously no one plan that will do the job in every case. The matter must be assessed in light of the circumstances present and the options available in each instance. It is incumbent upon the school board to establish that its proposed plan promises meaningful and immediate progress toward disestablishing state-imposed segregation. It is incumbent upon the district court to weigh that claim in light of the facts at hand and in light of any alternatives which may be shown as feasible and more promising in their effectiveness.

Petitioners, nonetheless, contend that the "classification of school children by race in order to end the evils of racial classification" is unlawful (Pet. 14); in short, that the Constitution precludes benign as well as invidious uses of race by the State. But it was settled in *Green* that a school board must take race into account in order to disestablish a dual school

system. 391 U.S. at 437–38, 440, 442 n. 6. As the court of appeals explained the matter in this case: "At this point, and perhaps for a long time, true nondiscrimination may be attained, paradoxically, only by taking color into consideration" (Pet. App. A10).[6] See *United States* v. *Jefferson County Board of Education,* 372 F. 2d 836, 876 (C.A. 5), affirmed on rehearing, 380 F. 2d 385 (C.A. 5) (*en banc*), certiorari denied *sub nom. Caddo Parish School Board* v. *United States,* 389 U.S. 840; *Offerman* v. *Nitkowski,* 378 F. 2d 22 (C.A. 2); *Norwalk Core* v. *Norwalk Redevelopment Agency,* 395 F. 2d 920, 931 (C.A. 2). See, also, *Louisiana* v. *United States,* 380 U.S. 145, 154.

Finally, the petitioners are, of course, mistaken in their assertion that the court of appeals has required racial balance in the schools in question. The decision below, as we have shown, merely requires petitioners to adopt feasible means to desegregate all schools that remain as vestiges of the dual school system, and in this there is no novelty.

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[6] Equally misplaced is petitioners' reliance upon Sections 401(b) and 407(a) of the Civil Rights Act of 1964. As we explained in our Memorandum in *McDaniel* v. *Barresi*, No. 420, this Term (Pet. 11–12), the purpose of these provisions was to make clear that the 1964 Act did not grant to federal officials or courts the power to require remedial action by school systems which were already in compliance with the Fourteenth Amendment. Since, for the reasons stated above, the decision of the court of appeals does not require racial balance and the case does not involve the issue of whether purely adventitious, de facto segregation gives rise to remedial obligations under the Fourteenth Amendment, the disclaimers of the Civil Rights Act are totally inapposite here.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1970.

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IN THE

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OCTOBER TERM, 1970

No. 784

THE BOARD OF PUBLIC INSTRUCTION OF BAY COUNTY, FLORIDA, ET AL., *Petitioners,*

v.

JEAN CAROLYN YOUNGBLOOD, ET AL., and UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

Within the limitations imposed by Rule 24(4), the petitioner Board submits three points in reply to the Government's Brief in Opposition; two are substantive, while the third raises a serious procedural issue that is common to virtually every school desegregation case.

1. The Constitution Bars Classification Based on Race.

We disagree emphatically with the position of the court below (Pet. App. A10, quoted at Br. Op. 7) that "true nondiscrimination may be attained, paradoxically, only by taking color into consideration." This is the same odious fallacy that the court below has espoused ever since its ill-starred decision in *United States* v. *Jefferson County Board of Education,* 372 F.2d 836, 380 F.2d 385, certiorari denied *sub nom. Caddo Parish School Board* v. *United States,* 389 U.S. 840, and to which it has tenaciously adhered ever since.

We similarly disagree with the Government's position, expressed orally by the Solicitor General during the argument of the six school cases on October 12-14, that racial classification is justified in order to correct past discrimination.

Our starting point, although obviously it cannot be fully developed at this juncture, is that every form of racial classification is unconstitutional. Apart from that, we submit that the foregoing formulations on the part of the United States really beg the question, inasmuch as dual school systems for many years, indeed as late as *Gong Lum* v. *Mississippi,* 275 U.S. 78 (1927), were held *not* to involve either discrimination or unconstitutional State action.

Consequently to argue, as did all the respondents below, and as the Solicitor General contended orally here in October, that present racial discrimination is justified by the prior fact of dual school systems, is to say as a realistic matter that it is proper to exclude children of both races from the schools nearest their homes because of their color and only because of their color, directly contrary to the ruling in *Alexander* v. *Board of Education,* 396 U.S. 19, 20, simply because this Court some 45 years ago held views differing from those that prevail today.

It is proper also to note that the dichotomy suggested by the Government (Br. Op. 7) between "racial balance," of

which we complain, and "feasible means to desegregate," which the Government supports as well settled, involves—depending on the point of view—either semantics or else a sorry quibble. The court below has long insisted that desegregation involves racial balancing; the Congress, undertaking to enforce the Fourteenth Amendment, has clearly indicated the contrary—our next point.

2. The Civil Rights Act Provisos Are Highly Relevant.

President Kennedy called on the Congress to exercise its power under Section 5 of the Fourteenth Amendment to implement that Amendment, and Congress did so, indicating in §§ 401(b) and 407(a) of the Civil Rights Act of 1964 in clear and unmistakable language its view that desegregation did not include, and should not include, racial balancing. We set forth the text of those provisos at Pet. 3-4, summarized their legislative history at Pet. 10-11, and then expanded our summary to include every significant feature of this history at Pet. App. A21-A27.

No objective or dispassionate person examining the actual legislative history of those provisos can, we submit, fairly arrive at the conclusion set forth in the Memorandum for the United States in *McDaniel* v. *Barresi*, No. 420, this Term, that we quoted at Pet. 11-12 and that the Government now reaffirms in a footnote (Br. Op. 7, note 6). That is because the Government's conclusion rests on a very few citations to fragmentary, inadequate, and hence thoroughly misleading excerpts from that legislative history—which it resolutely refuses to examine in its entirety.

In the arguments before this Court last month, the Civil Rights Act provisos received only glancing mention. We submit that it would be eminently appropriate for those provisos to be explored in depth, on plenary hearing and on the basis of the complete legislative history, rather than on the unrepresentative fragments twice served up to this Court by way of trivializing a solemn determination made by the Congress.

3. The Government's Suggestion That Petitioner Is in the Wrong Court Effectively Deprives All School Boards of Review By This Court.

The Government says (Br. Op. 5, note 5) that "Insofar as petitioners are complaining of orders of the district court rendered subsequent to the decision of the court of appeals (see Pet. 2, 9-10), they are, of course, before the wrong court. 28 U.S.C. 1291."

That facile, footnoted, and wholly fallacious "of course" conceals the fact that the quoted comment in reality suggests depriving school board defendants of review by this Court—because of the course of action consistently followed by the court below.

1. It is now settled that in school cases in the Fifth Circuit "No stay will be granted pending petition for rehearing or application for certiorari." *Singleton* v. *Jackson Municipal Separate School Dist.*, 419 F.2d 1211, 1222.

2. In the opinion sought to be reviewed, which was handed down on July 24, 1970 (Pet. App. A1), the district court was directed to "hold a prompt hearing and shall approve a more effective segregation plan to be put into effect in September 1970" (Pet. App. A11). The district court order of August 14 (Pet. App. A13-A20) was entered pursuant to that mandate.

3. A petition for rehearing seeking clarification of the Fifth Circuit's opinion in this case was served and filed on August 5, before the district court acted—but that petition was held and not denied by the court below until September 11, more than a month later (Pet. App. A12).

4. What the district court ordered, in the absence of further clarification from above, complied in every respect with the directions of the court below (Pet. App. A10-A11). True, those directions were not explicit, but they clearly justified, indeed they required, what the district court then ordered (Pet. App. A13-A20).

The transcript of the August 14 hearing at which the district court adopted the plan now in effect shows that, far from there being any objection that such plan was not in accordance with the direction of the court below, the plan was agreed to by counsel for both sets of respondents, subject to later reports regarding its operation and effect.*

5. It follows that the present petition seeking a writ directed to the court of appeals necessarily involves review of what the district court did in conformity to, and under the compulsion of, the court of appeals' decision. (In this connection it is to be noted that the court below now enters

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* See transcript of district court hearing, Aug. 14, 1970, pp. 11-12:

"MR. BOWERS [Counsel for respondents Youngblood *et al.*]:

"May it please, the Court, we have agreed to this plan as a compromise. We will have to delay a decision on whether it establishes a unitary system until after the School Board files its reports and see who actually is in the school and etcetera, but we think it is a good—

"THE COURT:

"Do you feel as the plan exists as presented absent some unusual turn over or some change in the number of students attending the various schools, that this plan would accomplish a unitary system?

"MR. BOWERS:

"Yes, sir.

"THE COURT:

"Thank you, sir. Mr. Buckley?

"MR. BUCKLEY [Of the Civil Rights Division, Dep't of Justice]:

"That is the Government's position also, Your Honor. We would like to see it in operation. This is a plan that has been talked about in prior proceedings in this case, and we feel it will [result] in a unitary system, but again we would like to review the reports when it has been implemented for a period of time."

no formal judgments as mandates in school board cases, and that the opinion is issued as and for the mandate in all such cases.)

The conclusion advanced by the Government, that petitioner is seeking relief in the wrong forum, would involve a whipsawing of school boards in cases such as this one, since it would require them to take two appeals before the cause is ripe for certiorari, and, it may be, even more. That conclusion consequently involves the unacceptable, and, we submit, inadmissible result that the Fifth Circuit's present rush-rush-rush practice in school cases effectively insulates its rulings from this Court's prompt corrective scrutiny.

CONCLUSION

For the foregoing additional reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER 1970.